No. 466

Office - Supreme Court, U. S.
FILED
DEC 16 1948
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1948

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
SUPPORTING BRIEF

INDEX

	Page
Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit	1-7
Opinion below	1
Statement of the matters involved	2
Jurisdiction	5
Questions presented	5
Reasons why writ of certiorari should be granted	6
Brief for Petitioner	9-47
Opinion of the court below	9
Jurisdiction	10
The facts	10
Specification of errors	11
Point One: The Court of Appeals erred in holding that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946	12
Authorities and Argument	12
Point Two: The Court of Appeals erred in holding that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard	41
Point Three: The Court of Appeals erred in denying petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent	41
Authorities and argument (Points Two and Three)	41

Pages

Point Four: The Court of Appeals erred in holding that the object of the action is that of a contest of an election 44

Authorities and argument 44

Point Five: The Court of Appeals erred in directing dismissal of the action because it, in effect, denies to petitioner the right to amend his complaint and ask for the recovery of damages on the basis of the facts there alleged 46

Authorities and argument 46

Appendix 49-56

AUTHORITIES

	Page
Ferguson vs. Huggins, 122 Tex. 95, 52 S. W. (2d) 904	3, 28
Giles vs. Harris, 189 U. S. 475	43
Gilmore vs. Waples, 108 Tex. 167, 188 S. W. 1037	16, 37
Hague vs. C. I. O., 307 U. S. 496	39, 40
Lane vs. Wilson, 307 U. S. 268	44
Mills vs. Board of Education, 30 F. Supp. 245	7
Nixon vs. Herndon, 273 U. S. 536	29
Smith vs. Allwright, 321 U. S. 649	17, 19, 27, 29
Sterling vs. Ferguson, 122 Tex. 122, 53 S. W. (2d) 573	3
United States vs. Bathgate, 246 U. S. 220	31, 35, 36
United States vs. Classic, 313 U. S. 299	6, 13, 14, 15, 16, 17, 18, 19, 20, 22, 27, 31, 36, 45
United States vs. Gradwell 243 U. S. 476	31, 33, 34
United States vs. Mosley, 238 U. S. 383	21, 45
United States vs. Saylor, 322 U. S. 385	21, 45
Westerman vs. Mims, 111 Tex. 29, 227 S. W. 178	16
Act of May 31, 1870, 16 Stat. 140	35
Act of April 20, 1871, Section 1	40
Act of February 8, 1894, 28 Stat. 36	35
Constitution of the United States	
Article I, Section 2	13, 19
Article I, Section 3, Clause 3	10, 23, 24
Article I, Section 4	13
Fourteenth Amendment	40
Seventeenth Amendment	6, 10, 12
Criminal Code	
Section 19 and 20	13, 21, 32, 34, 35, 36, 46
Section 37 (Title 18, Sec. 88, U.S.C.A.)	32, 34
Revised Statutes, Sec. 1979	40, 43
United States Code	
Title 28,	
Sec. 1254	5, 10
Sec. 1342	29
Secs. 1331 and 1343	5
Secs. 2201 and 2202	7, 42
United States Code Annotated, Sec. 43, Title 8	4, 20, 38, 40, 46

Page

United States Code, 1946
Title 2, Sec. 1 ..... 10, 12, 24
Title 5, Sec. 43 ..... 4, 5, 6, 10, 11, 28, 30, 36, 38
Title 18, Secs. 51 and 52 ..... 20, 22, 26, 32, 43, 45, 46
Sec. 88 32

Vernon's Texas Civil Statutes
Articles 1735, 1735a and 3142 43
Articles 2925, 2956, 3100-3153 27

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. _____

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Supreme Court of the United States:

Coke R. Stevenson, Petitioner, prays that writ of certiorari issue to review the final judgment and decision of the United States Court of Appeals for the Fifth Circuit entered on October 7, 1948, reversing the order of injunction issued by the United States District Court for the Northern District of Texas and remanding the case with direction to dismiss the complaint. (R., 209.)

OPINION BELOW

The opinion below appears in the Record (201-207) and a copy thereof is printed as an appendix to this petition.

STATEMENT OF THE MATTERS INVOLVED

Petitioner, as plaintiff below, appellee in the Court of Appeals, instituted this action by filing a complaint in the United States District Court for the Northern District of Texas on September 15, 1948 (R., 2-8).

The pleadings (the original complaint, R., 2-8; the amendment thereto, R., 10-15; and the trial amendment, R., 184) of petitioner Stevenson alleged, in substance, the candidacy of Stevenson and respondent Johnson for nomination by the Democratic party for the office of United States Senator from Texas; that nomination by the Democratic party is tantamount to election; that after the votes had been counted in one of the precincts in Jim Wells County and the results announced, the party officials fraudulently increased the count for respondent Johnson some 200; that, as so fraudulently increased, the vote in Jim Wells County was certified by local party officials to the State Democratic Executive Committee; that after the votes had been counted in Zapata County and the results announced, the party officials fraudulently increased the count for respondent Johnson and decreased the count for petitioner Stevenson; that as so fraudulently changed, the vote in Zapata County was certified by the local party officials to the State Democratic Executive Committee; that the canvass by the State Democratic Executive Committee gave effect to such fraudulent returns; that the returns from the various counties as canvassed by the State Democratic Executive Committee showed respondent Johnson received a majority of 87

votes over petitioner Stevenson; that the fraudulent increase in the count for respondent Johnson shown in the returns from Jim Wells and Zapata Counties was more than sufficient to account for the 87 vote majority shown by the canvass by the State Democratic Executive Committee; that except for such fraud the canvass by the State Democratic Executive Committee would have shown a majority for petitioner Stevenson; that the returns from Duval County showing 4,622 votes for respondent Johnson and 40 votes for petitioner Stevenson are fraudulent on their face; that the State Democratic Executive Committee in making its canvass of the returns from the various counties of the state acted as a canvassing board and had no power to conduct a contest or correct said fraudulent returns *(Ferguson vs. Huggins,* 122 Tex. 95, 52 S. W. (2d) 904); and that the laws of Texas do not provide a feasible or possible means of contesting a statewide primary election *(Sterling vs. Ferguson,* 122 Tex. 122, 53 S. W. (2d) 753). Such were in general the allegations of the pleadings of petitioner Stevenson.

The relief sought by petitioner Stevenson was, in substance, injunction against the certifying of respondent Johnson as the Democratic nominee for United States Senator from Texas; cancellation of the certificate of the Chairman and Secretary of the State Democratic Convention, if one had issued; injunction against the printing of respondent Johnson's name on the general election ballot; and for a declaration that petitioner Stevenson, in fact, had received the nomination. This latter part of the prayer was broad enough to warrant a declaration on

the allegations of fraud and of the rights of petitioner Stevenson and respondent Johnson.

The statement of facts (R., 73-140) brought up on the appeal discloses that the material allegations of the complaint and amendments were sustained by the testimony before the trial court. The findings of the trial court (R., 190-191) also sustain the essential allegations of the complaint.

The Election Board of Blanco County, Texas, intervened in opposition to petitioner's suit. (R., 47.)

H. L. Poole, A. G. Johnson and F. A. Harkrider, as voters who had voted for petitioner in the Democratic primary on August 28, 1948, intervened (R., 182-183), alleging that they had been deprived of their rights by illegal election returns made from Jim Wells County, as alleged in the original and amended complaints filed by petitioner, and adopted petitioner's pleadings.

The District Court, after hearing, granted a temporary injunction, pending determination of the action, restraining the certification to the election boards of the various counties of Texas the name of respondent Johnson as nominee of the Democratic party for Senator from Texas, and restraining the election boards from preparing and distributing official ballots for use in the general election to be held on November 2, 1948, carrying the name of respondent Johnson as the candidate of the Democratic party for the office of United States Senator from Texas. (R., 60-63.)

The action was brought under Title 8, Section 43, United States Code, 1946 (Title 8, Section 43, United States Code Annotated). Petitioner asserts that

jurisdiction in the District Court existed under Title 28, United States Code, Sections 1331 and 1343.

The injunction order granted by the District Court was reversed by the Court of Appeals for the Fifth Circuit and remanded with direction that the complaint be dismissed. (R., 209.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

The reasons relied on for allowance of the writ are stated below under the heading "Reasons Relied On."

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that Petitioner as a candidate for nomination by a political party for the office of United States Senator has no right secured to him by the Constitution of the United States within the provisions of Title 8, Section 43, United States Code, 1946.

2. Whether the Court of Appeals was correct in holding that Title 8, Section 43, United States Code, 1946, and Title 28, United States Code, Section 1343, do not authorize equitable relief to Petitioner under the allegations of the complaint and the testimony heard.

3. Whether the Court of Appeals was correct in holding this action as an election contest because the evidence heard and that to be taken by the Masters appointed by the trial court is of that character which is appropriate to an election contest.

4. Whether the Court of Appeals correctly ordered dismissal of the action.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

1. The holding of the Court of Appeals that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946, is an erroneous ruling on an important question arising under the Constitution and laws of the United States (*Constitution of the United States, Seventeenth Amendment; United States vs. Classic*, 313 U. S. 299); and this holding, together with the direction of the trial court to dismiss petitioner's complaint, has the effect to deprive petitioner of the right to claim damages by amendment to his complaint or in an independent action.

2. The holding of the Court of Appeals that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard, does not give appropriate effect to the provisions of Title 8, Section 43, United States Code, 1946, providing that a person who has been deprived of a right secured to him by the Constitution of the United States may have redress in an action at law, suit in equity or other proper proceeding.

3. The holding of the Court of Appeals is erroneous because it, in effect, denies to petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent Johnson. (Title 28, United

States Code, Sections 2201 and 2202, the *Declaratory Judgment Statutes; Mills vs. Board of Education*, 30 F. Supp. 245.)

4. The Court of Appeals erred in holding that the object of the action is that of a contest of an election because the evidence heard and that to be taken by the Masters appointed by the trial court is appropriate to such a contest.

5. The order of the Court of Appeals directing dismissal of the action is erroneous because it, in effect, denies to petitioner the right to amend his complaint and ask for the recovery of damages on the basis of facts there alleged.

WHEREFORE, petitioner respectfully prays that writ of certiorari issue to the Court of Appeals for the Fifth Circuit, to the end that the record in the appeal, styled *Lyndon B. Johnson, V. E. Streigler, Frank Shelley and C. H. Stevenson, Appellants, vs. Coke R. Stevenson, Appellee*, No. 12,529 on the docket of said Court of Appeals, may be brought before this Court for review and the judgment and decree of said Court of Appeals reversed, and particularly in so far as it directs dismissal of the action; and that Petitioner may have such other and further relief as may seem proper and just.

Respectfully submitted,

C. C. RENFRO
Dallas, Texas

JOSH H. GROCE
San Antonio, Texas

HENRY H. BROOKS
Austin, Texas

DAN MOODY
Austin, Texas
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No._____

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

BRIEF FOR PETITIONER

To the Supreme Court of the United States:

Petitioner respectfully submits this brief in support of his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not officially reported, but it is printed in the appendix and appears in the Record at pages 201-207.

JURISDICTION

The judgment and decree to be reviewed were rendered by the Court of Appeals on October 7, 1948. (R., 209.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Petitioner claims rights under the Seventeenth Amendment to the Constitution of the United States and under Title 8, Section 43, United States Code, 1946; and construction of the Seventeenth Amendment, of Section 1, Title 2, United States Code, 1946; of clause 1, Section 4, Article 1 of the Constitution, and of Section 43, Title 8, United States Code, 1946, are necessary, in petitioner's view, to a proper determination of the case.

THE FACTS

Petitioner and respondent Johnson were candidates for the Democratic nomination for the office of United States Senator from Texas before the general primary election held in Texas on August 28, 1948. The State Democratic Executive Committee, upon canvassing the returns from the several counties in Texas, determined that such returns showed that Respondent Johnson received a majority of eighty-seven (87) votes. Petitioner Stevenson brought this action, alleging that fraudulent returns had been sent to the State Democratic Executive Committee from three Texas counties and that such fraudulent returns were sufficient to more than account for the majority vote accorded to respondent Johnson on the canvass made by the State Democratic Executive Committee. (R., 2-8, 10-15, 184.)

In his complaint, as amended, petitioner Stevenson prayed for injunctive relief restraining certification of the name of respondent Johnson as the nominee of the Democratic party for the office of United States Senator from Texas and for declaration that petitioner had received the nomination for said office. (R., 14-15.)

The allegations of the complaint charged fraudulent returns adverse to petitioner's interest; and the relief sought was broad enough to support a judgment declaring the existence or non-existence of fraud and the relative rights of petitioner and respondent Johnson.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946.

2. In holding that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard.

3. In denying to petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent Johnson.

4. In holding that the object of the action is that of a contest of an election.

5. In directing dismissal of the action because it, in effect, denies to petitioner the right to amend his

complaint and ask for the recovery of damages on the basis of facts there alleged.

POINT ONE

The Court of Appeals erred in holding that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946.

AUTHORITIES AND ARGUMENT

The Seventeenth Amendment to the Constitution of the United States provides:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

The Congress has provided (Section 1, Title 2, United States Code, 1946) that:

> "At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by

> the people thereof for the term commencing on the 3rd day of January next thereafter."

Clause 1, Section 4, Article I of the Constitution provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The section of the Constitution providing for the election of members of the House of Representatives (Clause 1, Section 2, Article I) controlled in *United States vs. Classic*, 313 U. S. 299, 310, and it provides as follows:

> * * * "'The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the Most numerous Branch of the State Legislature.'"

In the *Classic* case a question for decision was "Whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured by the Constitution' within the meaning of Sections 19 and 20 of the Criminal Code."

The charge was that the appellees had conspired to injure and oppress citizens in the exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States (313 U. S. 308), "namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." The overt acts charged were the altering of ballots by the appellees, and falsely certifying the number of votes cast for the respective candidates. In the Supreme Court, the Government did not seek to sustain the application of the sections of the Criminal Code to the rights of the candidates. Hence that question is not discussed in the opinion.

On the right to choose a representative in Congress, the Court said (313 U. S. 310-311, 313-315):

> "Article I, Section 2 of the Constitution, commands that 'The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.' By Section 4 of the same article 'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.' **Such right as is secured**

by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by Section 2 and to the authority conferred on Congress by Section 4, to regulate the times, places and manner of holding elections for representatives.*

"We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter, and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellees' alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of Section 19 and to deprive inhabitants of the state of that right within the meaning of Section 20, and finally, whether Sections 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

"Pursuant to the authority given by Section 2 of Article I of the Constitution, and subject to the legislative power of Congress under Section 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other

*All emphasis herein is supplied.

states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3.

* * *

"The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas vs. Trebucq, supra,* voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election.* In fact, as alleged in the indictment, the practical operation of the primary in Louisiana is, and has been since the primary election

* See *Westerman vs. Mims,* 111 Tex. 29, 227 S. W. 178; *Gilmore vs. Waples,* 108 Tex. 167, 188 S. W. 1037.

was established in 1900, to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.

"Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman* The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

"We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*,

* See *Smith vs. Allwright*, 321 U. S. 649.

110 U. S. 651; *United States vs. Mosley*, 238 U. S. 383. And see *Hague vs. C. I. O.*, 307 U. S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights' 'secured by the Constitution' appearing in Section 1 of the Civil Rights Act of 1871. 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see *Minor vs. Happersett*, 21 Wall. 162, 170; *United States vs. Reese*, 92 U. S. 214, 217-218; *McPherson vs. Blacker*, 146 U. S. 1, 38-39; *Breedlove vs. Suttles*, 302 U S.. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Section 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Section 4 and its more general power under Article I, Section 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' See *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough, supra*, 663, 664; *Swafford vs. Templeton*, 185 U. S. 487; *Wiley vs. Sinkler*, 179 U. S. 58, 64.

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. Ex parte Yarbrough, supra; Wiley vs. Sinkler, Supra; Swafford

vs. Templeton, supra; United States vs. Mosley, supra; see Ex parte Siebold, supra; In re Coy, 127 U. S. 731; Logan vs. United States, 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. Ex parte Yarbrough, supra; Logan vs. United States, supra."

Then in connection with the question as to whether the right to choose at a primary election a candidate for a party nomination for Congress is embraced in the right to choose Congressmen secured by Section 2 of Article I of the Constitution, the Court said (313 U. S. 318):

* * * "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

(In Texas, as in Louisiana, the primary is an integral part of the election procedure (*Smith vs. All-*

wright, 321 U. S. 649), and nomination by the Democratic party is, with rare exceptions, tantamount to election.)

The *Classic* case is authority for the propositions: (1) that where a primary election is a necessary step in the choice of candidates for representatives in Congress, the primary is an election within the meaning of the Constitutional provision and is subject to congressional regulation as to the manner of holding (313 U. S. 317); and (2) that the right of the voter in the primary is included within the term, "any right or privilege secured to him by the Constitution or Laws of the United States" as used in Title 18, Section 51, United States Code, 1946, and within the meaning of the term, "any rights, privileges, or immunities secured or protected by the Constitution and Laws of the United States," as used in Section 52, Title 18, United States Code, 1946 (313 U. S. 321-325).

In the opinion in the *Classic* case the Court indicated, if it did not hold, that Section 43 of Title 8, U.S.C.A., applies to primaries, for there the Court said (313 U. S. 323):

> * * * "It does not avail to attempt to distinguish the protection afforded by Section 1 of the Civil Rights Act of 1871, to the right to participate in primary as well as general elections secured to all citizens by the Constitution, see *Guinn vs. United States*, 238 U. S. 347; *Nixon vs. Herndon*, 273 U. S. 536; *Nixon vs. Condon*, 286 U. S. 73; *Lane vs. Wilson*, 307 U. S. 268, on the ground that in those cases the injured citiens were Negroes whose rights were clearly protected by the Fourteenth Amendment. At

> least since *Ex parte Yarbrough, supra*, and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, Sections 2 and 4 of the Constitution."

In *United States vs. Saylor*, 322 U. S. 385, the indictments charged a violation of Section 19 of the Criminal Code (18 U.S.C.A. 51) by defendants by inserting false ballots into the ballot box and returning them, together with lawful ballots, so as to create false and fictitious returns respecting the votes lawfully cast in an election for United States Senator. The question was whether the provisions of the statute covered a conspiracy by election officials to stuff a ballot box in an election at which a member of the Congress of the United States was to be elected. In the instant case there is a charge that votes were falsely added to the returns in one county and that in the other county votes were deducted from the count for petitioner Stevenson and that votes were falsely added to the vote for respondent Johnson.

This Court reversed the judgment of the trial court sustaining demurrers to the indictments, and after discussing *United States vs. Mosley*, 238 U. S. 383, said (322 U. S. 387-388):

> * * * "The conclusion was that Section 19 protected personal rights of citizens including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from

> the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."

It may be said with certainty that the *Classic* case and the *Saylor* case settle these points: (1) that the right of a voter to vote in a primary election at which a nomination is to be made of a candidate for Congress is a right secured to him by the Constitution and laws of the United States; (2) that falsely counting the votes or stuffing the ballot box deprives the voter of a right secured to him by the Constitution and laws of the United States; (3) that the right of which the voter is deprived by such conduct is a right within the meaning of the term "right or privilege secured to him by the Constitution and laws of the United States," as used in Section 51, Title 18, United States Code, 1946, and a right within the meaning of the term "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States," as used in Section 52 Title 18, United States Code, 1946.

The Seventeenth Amendment in providing that the "Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years," and that the "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures" secures three rights: *first*, the right to each state to be represented in the United States by two Senators; *second*, the right of the people of each state who have the qualifications requisite for electors of the most numerous branch of the legislature of that

state to vote for candidates for United States Senator and to elect two persons to represent the state in the United States Senate; and *third*, the right of any inhabitant of the state who has been a citizen of the United States for nine years and has attained the age of thirty years to become a candidate for, and upon receiving the greater number of votes, to be chosen United States Senator.

If the third of these mentioned rights is not secured by the Seventeenth Amendment alone, it is secured by that provision of the Constitution, together with Clause 3, Section 3, Article I of the Constitution of the United States providing that:

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

There cannot be an election or any choosing of a United States Senator by election of the people unless two things concur. *First*, there must be electors to vote; and *second*, there must be candidates to vote for.

The Constitution imposes no limitations upon who may vote except that only those electors may vote who have "the qualifications requisite for electors of the most numerous branch of the State legislature." Congress has the power to alter the regulations enacted by states as to the times, places and manner of holding elections for Senators, "except as to the places of chusing Senators." Thus far, the only

actions taken by Congress on this subject are set forth in the provisions of Section 1, Title 2, United States Code, 1946, providing the time for election of United States Senators.

It is not conceivable that Congress could impose qualifications on one's right to be elected to the United States Senate in addition to those set forth in Clause 3, Section 3, Article I of the Constitution. At any event, Congress has made no such attempt nor has Texas. The right of any person who is not disqualified by that clause of the Constitution has the right under the Constitution to become a candidate for and be elected to the United States Senate from the state of which he is an inhabitant. The rights then are of the people who possess the requisite qualifications to become candidates for United States Senator and of the people who possess the requisite qualifications to vote for or against such candidates. Except these rights exist concurrently there can be no election in any state of a United States Senator. The right to become a candidate is just as much secured by the Constitution as the right to vote for or against candidates.

The Constitution that secures to the voter the right to vote for or against candidates for the United States Senate also secures to every citizen the right to become a candidate for the United States Senate provided he is not disqualified by the provisions of Clause 3, Section 3, Article I of the Constitution. The right of the candidate to have counted the votes cast for him is just as firmly secured by the Constitution as is the right of the voter to have his vote honestly counted. The right of the candidate that

the ballot box shall not fraudulently be stuffed against him is just as firmly secured by the Constitution as is the right of the voter that the effect of his vote shall not be destroyed by a stuffing of the ballot box.

When it is held that the citizens of Texas had the right in the primary election held on August 28, 1948, to vote for or against petitioner Stevenson and that this right was secured to them by the Constitution of the United States, it necessarily follows that it must be held that the constitutional provisions securing to the voters the right to vote, along with the other provisions of the Constitution with respect to the election of Senators, secured to petitioner Stevenson the right as a citizen to become a candidate, the right as a qualified voter to vote in the primary, and the right to have the votes honestly counted and returned by the election officials.

To say that the Constitution secures to the voter the right to vote for candidates for United States Senator and have his vote honestly counted, and that Section 43, Title 8, United States Code, 1946, gives a remedy for the deprivation of that right, but that the candidate does not have a right to an honest election and honest returns, and that the defeating of his candidacy by a dishonest count or stuffing of the ballot boxes is not a deprivation of a right secured to him by the Constitution and laws, is to render illogical and insupportable in reason the holding with respect to the right of the voters. If the answer comes back that the law does not secure to the voter the right to an honest count, the reply is that it was held in the *Classic* case that an indictment was valid

which had been drawn under Sections 51 and 52, Title 18, U.S.C.A., and charges that voters had been deprived of a right secured to them by the Constitution by the dishonest counting of the votes; and the language of Section 43, Title 8, United States Code, 1946, and the language of the two criminal statutes with respect to the rights protected thereby are substantially the same.

Every provision of law, constitutional or statutory, in this country, providing for an election of public officers contemplates an honest election, an honest count, honest returns, both as a right of the electors and as a right of the candidates. The very fact that a dishonest count of votes or dishonest returns by the election officials are prohibited by Sections 51 and 52, Title 18, United States Code, 1946, as a denial to the voters of their rights compels the conclusion that the same conduct would be a violation of those statutes as a denial to the candidate of a right secured to the candidate by the same law that secures to the voter the right to vote.

The Texas statutes provide, in substance, that the party County Executive Committee shall canvass the county election returns and certify the results thereof to the State Executive Committee; that the State Executive Committee shall canvass the returns from the several counties of the state and certify the results to the party State Convention; that the convention may approve or reject the report of the State Execuive Committee; and that the Chairman and Secretary of the State Convention shall certify to the Secretary of State the names of the party nom-

inees for state office. (Articles 3127, 3137 and 3138, *Vernon's Texas Civil Statutes.*)

Other statutes provide that the Secretary of State shall certify to county officers names of the various candidates for state office to be voted on in the general election; that the County Clerks of the several counties shall post the names of such candidates for ten days before ordering printed the general election ballots; and that absentee voting is permitted to begin twenty days before the day on which the election is to be held. (Articles 2925, 2956 and 3132, *Vernon's Texas Civil Statutes.)*

The Texas statutes set forth elaborate provisions with respect to the conducting of party primaries. In *Smith vs. Allwright*, 321 U. S. 649, 664-665, the Court spoke of these statutes as making "the action of the party the action of the state." They provide when the primary elections shall be held, where the voting shall be conducted, the officers who shall conduct the election, for the printing of ballots, what is necessary in order for a candidate to have his name printed on the ballot, for county executive committees, for the making of returns, for the canvassing of the returns, for state conventions, and for the certification of nominees. (Articles 3100-3153, *Vernon's Texas Civil Statutes.*)

The details of Texas law in respect to primary elections and of candidates securing the right to have their names printed on the general election ballot are comparable to those of the Louisiana law considered in *United States vs. Classic*, 313 U. S. 299, 311-314.

Title 8, Section 43, United States Code, 1946, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Primary election officials, the county party officers, the state party officers who have duties in connection with primary elections, and the Secretary of State and the county officers who have duties in connection with the general election, all act under state statutes. The primary election laws represent state action. What was done by the party officers in certifying the alleged fraudulent returns to the State Democratic Executive Committee was done "under color" of state law. In including the alleged fraudulent returns in its canvass, the State Democratic Executive Committee acted under a state law, and under one which, as construed by the Supreme Court of Texas in *Ferguson vs. Huggins*, 122 Tex. 95, 52 S. W. (2d) 904, withheld from the State Democratic Executive Committee the power to determine and cast out fraudulent returns.

In the broadest of terms Title 8, Section 43, United States Code, 1946, gives to any person "within the

jurisdiction" of the United States who has been deprived by another, acting under color of state law, "of any rights, privileges or immunities secured by the Constitution and laws" of the United States, the right to redress "in an action at law, suit in equity, or other proper proceeding for redress." The statute gives the cause of action. Another statute (Title 28, United States Code, Section 1342) confers jurisdiction of such causes of action on the District Courts.

The cause of action provided by Section 43 may be sued upon in the form of "an action at law" for damages for denial of the right to vote in a primary election, as in *Nixon vs. Herndon*, 273 U. S. 536, and *Smith vs. Allwright*, 321 U. S. 649; or equitable relief may be had in a "suit in equity." This latter provision of the statute evidences a legislative intent that the Congress did not intend that a person must wait until the deprivation has been accomplished, but intended to make available all equitable remedies, including injunction, to prevent the consummation of any threatened or attempted deprivation within the meaning of the statute.

The rights spoken of in these statutes are limited only by the provisions that they shall be rights secured by the Constitution and laws of the United States. They are not limited or qualified by the use of the term "civil rights," nor are they modified or enlarged by the use of the term "political rights." Cases are to be found in which the statement is made that the right to vote for public officers and the right of being elected to public office are political rights; that civil rights are those which have no relation to

the establishment or management of the government, but consist in the power of acquiring and owning property. Such expressions as these in the authorities are of no help here for the courts have recognized that the right to vote is a right within the term, "rights, privileges, or immunities secured by the Constitution." The statutes (Section 43, Title 8, United States Code, 1946) describe the rights for which redress may be had, and those rights are described as "any rights, privileges, or immunities secured by the Constitution and laws,"—"any rights" so secured. There is no limitation in the statute of the reach of the term "any rights," except the provision that they shall be rights secured by the Constitution. It may be assumed that the right to vote and the right to become a candidate are political rights; but as shown above, they are secured by the Constitution.

There is no need to pause to weigh the question as to whether the right to vote is a civil right or a political right. It is only necessary that it be a right in which the voter is protected by the Constitution or laws of the United States.

Section 43, Title 8, United States Code, 1946, does not mention either voters or candidates. It is directed against the deprivation of rights secured by the Constitution and laws of the United States. In applying this statute the attempt to set up a distinction between the right of a candidate and the right of an elector to an honest count of the votes and honest returns is necessarily arbitrary and unreasonable, because there is no support for it in the language of the statute. If the statute provides for redress to the voter for the deprivation of his right, it also affords

to the candidate the right to redress to prevent a dishonest count and dishonest returns, or redress from the wrong after it has been committed.

The Court of Appeals cited *United States vs. Gradwell*, 243 U. S. 476, 488, 489, and *United States vs. Bathgate*, 246 U. S. 220. It is respectfully submitted that these cases do not negative the proposition that the Constitution secures to a candidate for the office of United States Senator rights equal to those of the voters, or the proposition that a candidate by a dishonest count of votes or dishonest returns is deprived of a right in violation of Section 43, Title 8, United States Code, 1946.

In citing the *Gradwell* case, the Court of Appeals said it was there remarked that, "there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination." In view of the *Classic* case the remark cannot be accepted as a correct statement of the law.

The opinion in the *Gradwell* case involved the decision of four cases. Two of the indictments charged conspiracy to defraud the United States by corrupting and debauching, by bribery of voters at a general election at which representatives in Congress were voted for and elected in districts in Rhode Island. Another of the indictments related to the conduct of a primary election in West Virginia held under a law providing for a state-wide nomination of candidates for United States Senator. The charge was that the defendants had conspired to defraud the United States of its right to have candidates of the true choice and preference of the Republican and Democratic parties nominated, and one of them

elected, and that the defrauding was attempted by procuring persons to vote who were not qualified under the law and procuring others to vote more than once. The fourth indictment charged the defendants with conspiring to injure and oppress three candidates for the Republican nomination for United States Senator in a primary election held under West Virginia law by depriving them of the right and privilege of having each Republican voter vote only once, and of not having any votes counted except such as were cast by Republican voters duly qualified under West Virginia law. It was alleged that the defendants conspired to procure persons who were not qualified under state law to vote against the three and for another candidate.

The Court stated that the first three indictments above described were based solely upon the charge that the defendants had conspired to defraud the United States in violation of Section 37 of the Criminal Code (Title 18, Section 88, United States Code 1946), and that the fourth indictment was based upon the charge that three candidates were injured and oppressed within the meaning of Section 19 of the Criminal Code (Title 18, Section 51, United States Code, 1946). The Court considered the provisions of Section 37 of the Criminal Code prohibiting conspiracies to defraud the Government and held (243 U. S. 485) that it would be a strained and unreasonable construction to apply that section to elections. Then taking up the fourth indictment which charged the conspiracy to injure three of the candidates by procuring illegal voting for the fourth candidate in the primary, the Court considered Section

19 of the Criminal Code; and after describing certain features of the West Virginia primary election law, said (243 U. S. 488):

> "Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and **it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law and nothing of the kind can be found in any federal statute.** Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.
>
> "What power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the

> Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia."

The effect of the holding was that the rights of the candidates for nomination are derived from state law and not from the Constitution and laws of the United States. For that reason, and aside from the doubt expressed in the opinion as to the applicability of Section 19 of the Criminal Code to primaries, the decision must be regarded as having become obsolete in view of the decision in the *Classic* case.

The opinion in *United States vs. Bathgate*, 246 U. S. 220, disposed of six cases. The indictments were in three counts. The first and second attempted to allege conspiracy in violation of Section 19 of the Criminal Code, and the third a conspiracy to defraud the United States contrary to Section 37 of the Criminal Code. It was charged that the defendants conspired to injure candidates for presidential electors, the United States Senate and representatives in Congress and "qualified electors who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by Constitution and laws of the United States, namely—The right (a) of being a candidate, (b) that only those duly qualified should vote, (c) that the results should be determined by voters who had not been bribed and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others." It was alleged that the conspiracy

was carried into effect by purchasing votes and causing the election boards to receive them. The Court said (246 U. S. 224) that the real point involved "is whether Section 19 denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen." After discussing the repeal of parts of the Act of May 31, 1870, 16 Stat. 140, by the Act of February 8, 1894, 28 Stat. 36, which left in effect Section 19 of the Criminal Code, the Court held that "considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions," and rules respecting the construction of criminal statutes, Section 19 was not intended to apply to conspiracies to bribe voters. The Court pointed out that bribery was denounced in another section of the original act and was not clearly within the words of Section 19, and reasoned that the repeal of the section of the original act applicable in terms to bribery strengthened the conclusion that Section 19 of the Criminal Code was not intended to govern bribery.

The *Bathgate* case can be disposed of by two statements: *first*, that it held that Section 19 of the Criminal Code does not reach bribery of voters; and, *second*, that the effect of the decision in that case has been weakened if it has not been totally destroyed by the decision in the *Classic* case in so far as the opinion in the *Bathgate* case may be construed to hold that a conspiracy to deprive voters of the right to an honest election (it will be noted that the Court stated in the opinion that the two counts drawn under Section

19 charged a conspiracy to injure "also qualified electors who might properly vote thereat") is not within the reach of Section 19 of the Criminal Code.

The Court of Appeals stated that in the *Bathgate* case a distinction was made between the personal right of the voter and the general right of a candidate to a pure final election, but this was not made the basis of the decision and it was not necessary to the decision of that case.

Even assuming that the right asserted by petitioner is a political right, nevertheless, a remedy for the deprivation thereof, or attempted deprivation thereof, is provided by Section 43, Title 8, United States Code, 1946. The terms of the statute are broad enough to include all rights, privileges and immunities, provided only they are secured by the Constitution and laws of the United States.

In the *Classic* case the Court, in speaking of the right of the people to choose representatives in Congress, said (313 U. S. 314):

> * * * "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

It is evident from the quoted language that the Court meant that state statutes providing for the exercise of the right to vote, where the statues have

been enacted in conformity to the Constitution of the United States, are to be read in determining the scope of the rights secured by the Constitution. This obviously is correct, for if the prosecution had been for conspiracy to allow persons to vote who did not possess the qualifications of electors, it would have been necessary to look to state law to determine the requisite qualifications of an elector. It is the right of the people to choose in the manner provided by state action in conformity to the Constitution that is guaranteed or secured by the Constitution. The provisions of state law then with respect to the choice and who may vote and how a person may have his name printed on the ballot become an important subject for consideration in determining the right secured and protected by the Constitution.

Gilmore vs. Waples, 108 Tex. 167, 188 S. W. 1037, was an action by Gilmore to restrain the State Democratic Executive Committee from making a nomination of a candidate for State Railroad Commissioner, Gilmore having previously announced as a candidate for that office. A vacancy in the office had resulted from the death of the incumbent, and it was alleged that it was the purpose of the committee or convention to declare Hurdleston as the nominee of the party for that office. In that case the Court considered the question as to whether or not Gilmore's right to contest in the general election as a Democrat, without the disadvantage of an opposing Democratic nominee, was a mere political right where such nomination was not authorized by law. After stating that no appreciable conflict was believed to exist in the authorities upon the proposition that where the

making of a party nomination is once regulated by state law, the rights created and protected by the statute are legal—as distinguished from political—rights and that for their invasion, equity will afford its relief where there is no adequate legal remedy, the Court said (108 Tex. 176):

> "An essentially different status, however, is presented where the making of party nominations is governed by law. Rights arising under such laws, as is true in respect to all rights conferred by statute, are held to be legal rights, the exercise of which the courts will protect as a part of their duty to give effect to the written law of the land. And for the enforcement of such rights equity will not in proper cases deny its relief."

So, if the state law has been enacted in conformity with the Constitution and it is to be looked to in determining the scope of the right under the Constitution to choose representatives in the United States Congress or a United States Senator, then the Texas law, as construed by the court of last resort of the state, gives to the candidates a legal right which may be enforced by equitable remedies.

But, independent of state law, rights should be protected by equitable remedy under the provisions of Section 43, Title 8, even though such rights do not come strictly within the term "civil rights" as that term is defined to include those rights which have no relation to the establishment, support or management of the government. The right to vote for public officers and of being elected to public of-

fice are, in some of the early cases, said to be political rights. But it appears from the later cases that the right to vote is protected by Section 43; and if that is true, there seems to be no logical reason why the right to be elected to public office is not also protected by that statute. When the issue is reduced to the question as to whether Section 43 is intended to afford protection against the deprivation of political rights, the question is answered by determining whether or not the Constitution secures political rights, for the language of the statute is "any rights, privileges, or immunities secured by the Constitution." Certainly the Constitution does secure some political rights. Assuming that the right to vote for a candidate for Congress is a political right, it seems now settled that the right is secured by the Constitution and that it is protected by the Civil Rights Statutes.

In *Hague vs. C.I.O.*, 307 U. S. 496, the action was for injunction (307 U. S. 503) to restrain violations of what were claimed as constitutional rights of free speech and peaceable assembly. A city ordinance forbade the leasing of any hall, without a permit from the chief of police, for public meetings. An ordinance also forbade any person to distribute or cause to be distributed or strewn about any street or public place any newspaper, paper, circular, card or pamphlet. The plaintiffs in that case allege that they had been discriminated against by their being prohibited and interfered with in the distribution of leaflets and pamphlets while others were permitted to distribute similar printed matter. A question before the court was whether freedom to disseminate

information and to assemble peaceably for public discussion was a privilege or immunity secured by Section 1 of the Fourteenth Amendment and whether Section 1979 of the Revised Statutes (Section 43, Title 8, U.S.C.A.) afforded redress in a Federal Court for an abridgement of such right.

After quoting Section 1 of the Act of April 20, 1871, and stating that, as modified, it is now Section 43, Title 8, U.S.C.A., the Court said (307 U. S. 526-527):

> * * * "It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clause."
>
> * * *
>
> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by Section 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights."

The Court went on to hold (307 U. S. 529-530) that the suit could be maintained in Federal Court without allegation or proof that the constitutional immunity to be vindicated had a value in excess of three thousand dollars.

It cannot be said with any logic that a statute which gives the right to redress for the deprivation of "any rights, privileges, or immunities secured by the Constitution" protects an elector against deprivation of his right to vote and his right to an honest count of his vote, but does not give to a candidate for the United States Senate a right to redress for the deprivation or attempted deprivation of his right to an honest count of the votes cast and honest returns by the election officials.

POINT TWO

The Court of Appeals erred in holding that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard.

POINT THREE

The Court of Appeals erred in denying petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent.

AUTHORITIES AND ARGUMENT

(Points Two and Three)

After alleging fraud in the election returns, petitioner prayed for injunctive relief restraining certification to the Secretary of State of the name of

respondent Johnson as nominee of the Democratic party for United States Senator from Texas, for cancellation of the certificate if it had been issued, for injunctive relief restraining the Secretary of State from certifying to county officers the name of respondent Johnson as such nominee and restraining the county election boards from printing his name on the official general election ballot. Petitioner also prayed for declaration that he had received the nomination. (R., 8, 14.)

The declaratory judgments statutes (Title 28, U.S.C., Sections 2201 and 2202) were not specifically mentioned in the complaint. It does not appear that it was necessary to specifically mention them (Rule 8, Federal Rules of Civil Procedure) since they only provide an additional remedy for cases of which the Federal courts already have jurisdiction. The prayer for a declaration that petitioner received the nomination was certainly sufficient to justify judgment declaring the existence or non-existence of fraud in the returns and the respective rights of petitioner and respondent Johnson.

It seems evident that injunctive relief was proper to preserve the status quo pending determination of the rights of the parties. Traditionally it has been recognized that equitable relief may properly be granted to preserve the status quo.

If upon trial the evidence justified a judgment declaring that there had been fraud in the returns which had the effect to defeat what would otherwise have been the rights of petitioner, and such a judgment were entered by the court, it appears that petitioner would then have a remedy in the state courts

by mandamus to compel the placing of his name on the general election ballot. (Articles 1735, 1735a, 3142, *Vernon's Texas Civil Statutes.*)

It is true that in *Giles vs. Harris*, 189 U. S. 475, 486, this Court, in construing the words "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," as they appeared in Section 1979 of the Revised Statutes (now Section 43, Title 8, United States Code, 1946), said:

> * * * "They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."

The case was a bill in equity brought by a colored man on behalf of himself and more than 5,000 other negroes of Montgomery County, Alabama, similarly situated, praying that the county board of registrars be required to enroll upon the voting lists the name of plaintiff and the names of all other qualified members of his race who applied for registration, and for judgment declaring contrary to the Fourteenth and Fifteenth Amendments certain provisions of the Alabama Constitution, which it was alleged, in substance, had the effect to prevent a large part of the negro population from voting. The plaintiff was in the position in that case of asking the court, at a time when Federal courts did not have power to enter declaratory judgments, to declare the provisions of a

state law unconstitutional and at the same time to enforce the registration provisions of the laws which plaintiff was asserting to be invalid. In *Lane vs. Wilson*, 307 U. S. 268, 272, Mr. Justice Frankfurter in discussing the *Giles* case, wrote for the Court:

> * * * "The plaintiff there was in effect asking for specific performance of his right under Alabama electoral legislation. This presupposed the valdity of the legislation under which he was claiming. But the whole theory of his bill was the invalidity of this legislation. Naturally enough, this court took his claim at its face value and found no legislation on the basis of which specific performance could be decreed."

The instant case is a different sort of case from *Giles vs. Harris*. A part of the ultimate relief sought is a finding by the court on the allegations of fraud and a declaration as a result of such finding.

Injunctive relief to preserve the status quo pending development of the facts and the entry of judgment is traditionally a part of the equitable jurisdiction of the Federal courts and resort to equity to protect their jurisdiction is not an uncommon practice.

POINT FOUR

The Court of Appeals erred in holding that the object of the action is that of a contest of an election.

AUTHORITIES AND ARGUMENT

In the trial of the case, for petitioner to prevail, it would as a matter of course be necessary to

establish by testimony the number of votes cast and counted in Jim Wells County, Texas, and in Zapata County, Texas; and that thereafter returns were fraudulently prepared to show that a greater number of votes were cast than had in truth been cast. But, the nature of the case cannot be determined from the testimony alone. The pleadings and the relief sought must also be considered. In the trial of *United States vs. Classic*, 313 U. S. 299, and in the trial of *United States vs. Saylor*, 322 U. S. 383, or in any prosecution under Section 51, Title 18, United States Code, 1946, where an allegation of fraudulently counting of votes or stuffing of ballot boxes is made, it would be necessary for the same character of proof to be introduced, but the case could not for that reason be properly classed as an election contest. An action brought by a voter for damages under Section 43, Title 8, United States Code, 1946, on allegations that his vote had been fraudulently counted could not properly be classed as an election contest because it would be necessary on the trial to go into the ballot boxes and determine how he had actually voted and consult the tally sheets to see how his vote had been counted.

In *United States vs. Saylor*, 322 U. S. 385, the court discussed *United States vs. Mosley*, 238 U. S. 383, and stated that the case affirms that the right of the elector protected by Section 19 of the Criminal Code is not only the right to cast his ballot, but to have it honestly counted, and concluded that a conspiracy which resulted in the stuffing of a ballot box, having the effect to falsify the count of votes legally cast, was within the prohibitions of Section 19.

Section 43, Title 8, United States Code, 1946, was obviously intended to give redress in a civil action for such wrongs as are defined by Section 19 of the Criminal Code (Section 51, Title 18, United States Code, 1946) to constitute a crime. If an action were brought by voters under Section 43, Title 8, for damages upon allegations that the effect of their votes had been destroyed by a stuffing of the ballot box, it would be necessary to prove their votes and that the effect thereof was destroyed by the illegal stuffing of the ballot box, but the character of the testimony would not justify classing the action as an election contest.

It follows that this case should not be classed as an election contest and for that reason jurisdiction denied.

POINT FIVE

The Court of Appeals erred in directing dismissal of the action because it, in effect, denies to petitioner the right to amend his complaint and ask for the recovery of damages on the basis of the facts there alleged.

AUTHORITIES AND ARGUMENT

The decree of the Circuit Court (R., 209) is that the order of injunction issued by the District Court be set aside; that the case be remanded "to the District Court with direction to dismiss the petition."

There is no provision that the dismissal shall be without prejudice to petitioner's right to maintain an action for damages under Section 43, Title 8, United States Code, 1946. Upon remand, it seems

obvious that petitioner would have a right to amend and ask for damages on the basis of the facts alleged in the complaint, and that the Court would have jurisdiction of the action.

WHEREFORE, petitioner respectfully submits that the opinion and judgment of the Court of Appeals are erroneous; that the case presents important questions pertaining to the construction of the Constitution of the United States and the Acts of Congress; that certain of the questions have not been determined by this Court; and that the petition for writ of certiorari should be granted.

C. C. RENFRO
Dallas, Texas

JOSH H. GROCE
San Antonio, Texas

HENRY H. BROOKS
Austin, Texas

DAN MOODY
Austin, Texas
Attorneys for Petitioner.

Copies of the Petition and Brief have been sent to each of the Attorneys for Respondent.

APPENDIX

(Before HUTCHESON, SIBLEY, and McCORD, Circuit Judges.)

SIBLEY, Circuit Judge: On September 15, 1948, Appellee Stevenson filed this suit in the district court against Appellant Johnson and others to stop by injunction the certifying by the officers of the Democratic Party in Texas of the name of Johnson as the nominee of that party for United States Senator as a result of a Democratic primary election; to prevent his name as such being placed on the official ballots for the general election to be held November 2, 1948; and for a cancellation of such certification if made; and a declaration that Stevenson is the true nominee. The other defendants are the party officers who are charged with the duty of certifying; the Secretary of State to whom the certificate is addressed and who prepares the form of ballot; and the members of the election board of Tarrant County, who are alleged to be proper representatives of all the board members in the 253 other counties of the State who are too numerous to be brought before the Court. A restraining order was at once granted and a hearing set for a temporary injunction. At the hearing Johnson filed a motion to dismiss on various grounds, including these: that the relief sought is in essence a contest of the primary election and the Court has no jurisdiction to hear and determine such election contest; that the Court has no jurisdiction to determine the right and title to the Democratic nomination for United States Senator, and that such jurisdiction is expressly denied by 28 U. S. C., Sec. 1344; that no deprivation of a right or privilege secured by the Constitution or

laws of the United States is alleged, but only of a right to a party nomination under the election laws of the State of Texas, as to which there is no jurisdiction in the federal district court; and that there is no jurisdiction in equity to nullify a certificate of nomination duly made under the laws of Texas in favor of Johnson, who is a person qualified to hold the office, in order to substitute another as nominee. Johnson also filed under oath what he calls an opposition to the temporary injunction which takes issue with some of the factual allegations of the petition and proposes at a proper time and in a proper forum to show illegal votes in larger numbers which were counted for Stevenson than those Stevenson claims were fraudulently counted for Johnson. The other defendants filed motions to dismiss as to them and answers, but none of these has any real interest in the result or is charged with any personal misconduct, and they need not be further noticed. The motions to dismiss were overruled. Evidence was introduced by both Stevenson and Johnson tending to support their contentions of fact. The Court made no specific findings of fact, but held generally that the facts were with the plaintiff and granted a temporary injunction on September 22, 1948, "for the reason that there was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties, to the State Democratic Executive Committee, without which there would have been a change in the official certification by the officers of the State Convention as to who was the Democratic nominee for the office of United States Senator." The injunc-

tion forbids the certifying and reporting to the election boards of all the counties that Johnson is the Democratic nominee, and forbids the boards to prepare and distribute ballots carrying Johnson's name for use in the election. The appeal is from the grant of this temporary injunction.

We are of opinion that whatever may be the truth as to the fraudulent returns from certain precincts in the named counties, and whatever may be the truth as to illegal votes elsewhere which are claimed as more than an offset, the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief. The object to be attained is precisely that of a contest of an election, the evidence so far heard is all appropriate to such a contest, as is that proposed to be taken by one or more masters which the record shows are to be appointed to go to all the counties in which illegal returns or voting has been or may by amendment be alleged to have occurred. The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations and final elections. It is urged that there is not time to review a statewide primary by such a contest before the general election comes on. But if there were no provision at all for contesting the result of a primary it would not give a district court jurisdiction which it lacks. The Constitution, Art. I, Sec. 5, after all makes each House of Congress the final judge of the qualifications, elections, and returns of their respective members; and if a State, as Texas has done, makes nominations by a primary to be a part of its election machinery, and if, as is alleged here, Democratic nomi-

nation insures election, no reason occurs to us why this constitutionally provided judgment of the election should not reach back to the nomination; and we judicially know that such Congressional investigations have included primaries.

The jurisdiction of the district court is limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given it jurisdiction. The petition refers us to Sec. 1343 of Title 28 of the United States Code as recently revised and enacted, entitled "Civil Rights," and to Sec. 43 of Title 8 of the Code in the chapter on Civil Rights entitled "Civil Action for Deprivation of Rights." Both sections use equivalent language, that of Sec. 43 being: "Every person who under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The redress here chosen is a suit in equity. The right claimed is the Democratic nomination as United States Senator in a primary held under the laws of Texas, which is alleged to be a right of property exceeding $3,000 in value because Democratic nomination insures final election and the emoluments of the office far exceed that sum or value. We may assume without deciding that this nomination is the equivalent of election and that the right to the election is really in controversy. We then face Sec. 1344 of Title 28 entitled

"Election Disputes," which does give the district court jurisdiction over such disputes if the sole question arises out of the denial of the right to vote on account of race, color or previous condition of servitude, and limits the jurisdiction to the determination of the right to vote. No such question is raised in this case; but if it were, the section expressly excludes disputes concerning the office of "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a State legislature." This is a dispute about the office of United States Senator. In this section there is a manifest purpose to keep the judicial department from intervening, even by the usually available law writ of *quo warranto*, in the election of these high functionaries in the executive and legislative departments. According to the common law there was no right at all to contest in a court any public election, because they belong to the political branch of the government and are beyond the control of judicial power, and the only remedy in the nature of an election contest was a *quo warranto* or an information in that nature. 29 C.J.S., Elections, Sec. 246. This explains the words in Sec. 1344 "to recover possession of any office," which would be the object of a *quo warranto*. The aim of the section is to enable the district court to interfere in elections only to the limited extent it prescribes and to exclude it altogether from interfering with the election of a Senator or with the constitutional right of the Senate to judge of his election in all its steps or stages.

But if Sec. 1344 has no application because a party nomination is not an office, and if Sec. 1343 is to be applied, we get no further. Its words, as set forth in Sec. 43 of Title 8, were before the Supreme Court in *Giles v. Harris*, 189 U. S. 475, which was a case concerning the right of Negroes to register for voting in Alabama, which was brought by the excluded voters themselves. Their standing to complain under this statute had just previously been established, as it has been recently confirmed by *Smith v. Alwright*, 321 U. S. 649,, in the Supreme Court, and by *Chapman v. King*, 154 F. (2d) 460, in this Court. But Justice Holmes for the Court said, p. 486: "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of Sec. 1979 (now Section 43 of Title 8) does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief . . . The words allow a suit in equity only when it is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Green v. Mills, 69 Fed. 853, 30 L. R. A. 90." To *Green vs. Mills* may be added a host of authorities. 18 Am. Jur., Elections, Sec. 272; 30 C.J.S., Equity, Sec. 66 and cases cited. *Blackman v. Stone*, 17 F. Supp. 102, by three judges, contains a review of the federal cases. *Turman v. Duckworth*, 68 F. Supp. 744, is also a recent case by three judges. Ap-

peals in both cases were dismissed in the Supreme Court.

But Stevenson does not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it. He is here claiming a political nomination by a primary under the laws of Texas. As was remarked in *United States v. Gradwell*, 243 U. S. 476, 488, 489, in applying the similar provisions of the Criminal Statute then Sec. 19 of the Criminal Code (now Sec. 241 of Title 18) to a nominating primary, there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination; and the distinction between the personal right of the voter and the general right of a candidate to a pure final election was made in *United States v. Bathgate*, 246 U. S. 220, 226, 227. We have found no case holding that one claiming a nomination in a primary held under state law, though it be a part of the state election machinery, has any right secured by the laws of the United States. We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law. The persons alleged to have perpetrated the frauds are not even parties. We are of opinion, both on the words of Sec. 1343 of Title 28 and under the broad policy indicated in Sec. 1344, that there is here no case for interference by a federal court of equity in a senatorial primary; that the injunction ought not to have been granted; and that the motion to dismiss

ought now to be sustained. We can order dismissal on this interlocutory appeal. *Smith v. Vulcan Iron Works*, 165 U. S. 518, and cases following it.

The order of injunction is set aside and the cause is remanded with direction to dismiss the petition.

REVERSED WITH DIRECTION.